IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

OLIVIA S. McCOOL GEESLIN — PLAINTIFF/ COUNTER DEFENDANT

vs. — Civil Action No. 1:97cv186-D-A

NISSAN MOTOR ACCEPTANCE CORPORATION — DEFENDANT/ COUNTER CLAIMANT/ THIRD PARTY PLAINTIFF

vs.

LOSS RECOVERY, INC. and MIKE SHAMBLIN d/b/a Hunter Recovery — THIRD PARTY DEFENDANTS

MEMORANDUM OPINION

Presently before the court are the various motions of the parties, including the plaintiff's motion for partial summary judgment, the defendant's motion for summary judgment, and motions by both the plaintiff and defendant to strike affidavits offered in support of these motions. Finding that the motions to strike are not well taken, the court shall deny them. Finding that the plaintiff's motion for partial summary judgment is not well taken, the court shall deny it. Finally, finding that the defendant's motion for summary judgment is only partially well taken, the court shall grant it in part and deny it in part.

. Factual Background[1]

On July 1, 1995, the plaintiff Olivia Geeslin leased a 1995 Nissan Altima automobile.

[1] The court chooses not to delve into an exhaustive discussion of the facts surrounding this case. Rather, the court shall only briefly set forth those facts relevant to the discussion of the motions at bar. Further facts shall be mentioned in this court's discussion as they become necessary.

Pursuant to the lease agreement with the defendant Nissan Motor Acceptance Corporation ("Nissan"), Ms. Geeslin was to make thirty-six (36) regular monthly payments of $253.75, including tax. As of May 30, 1997, although the plaintiff had made twenty-one (21) of the scheduled payments, she was nevertheless two months behind in her payments. On or about April 25, 1996, Nissan sent the plaintiff a "Notice of Default" noting her arrearage.[2] Over the next thirteen months, the plaintiff continued to make her regular monthly payments but did not satisfy the two-months arrearage.

On or about May 19, 1997, Nissan contracted the third party defendant Loss Recovery, Inc. ("Loss Recovery") to repossess Ms. Geeslin's automobile. Loss Recovery then subcontracted the repossession work to third party defendant Mike Shamblin, d/b/a Hunter Recovery. On the evening of May 30, 1997, while the plaintiff and her husband were eating dinner at a local country club, Hunter Recovery repossessed the vehicle from the plaintiff's garage. According to the plaintiff, the garage door was down at the time she left the vehicle there at about 7:00 p.m., and was down when she returned home at about 10:00 p.m.[3]. After returning home and opening the garage door, she discovered that the vehicle was gone. Unnumbered Exhibit to Plaintiff's Motion, Affidavit of Olivia Geeslin, ¶¶ 14, 19-20.

This action followed. The plaintiff has moved this court for the entry of partial summary judgment on her behalf regarding her claim that the defendant wrongfully repossessed the leased

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[2] Nissan contends that it sent another notice to the plaintiff on or about January 16, 1996, but this fact appears to be in dispute.

[3] The question of whether the garage door was open or closed at the time of repossession is hotly contested in this matter. According to Mr. Shamblin:

> When I arrived at the [Geeslin] residence . . . the garage door to the house was open. No doors to the residence were opened or unlocked in order to repossess the Nissan Altima. No one objected to, or interfered with, the repossession on the night of May 30, 1997.

Exhibit "A" to Defendant's Response, Affidavit of Mike Shamblin.

automobile. The defendant has moved this court for the entry of summary judgment on its behalf on all of the plaintiff's claims. Additionally, both the plaintiff and the defendant have moved to strike supporting affidavits offered by the other side in support of their respective motions.

. Discussion

. Motions to Strike Affidavits of Mike Shamblin and Kathleen Foster

The plaintiff has moved to strike the affidavit of Mike Shamblin, attached by the defendant in support of its response to the plaintiff's motion for partial summary judgment and of the defendant's motion for summary judgment. Ms. Geeslin contends that Mr. Shamblin was not listed as having discoverable knowledge in the defendant's core discovery disclosures in this cause. As such, Ms. Geeslin seeks for this court to exclude the admission of any evidence from Mr. Shamblin. See Uniform Civil Justice Expense and Delay Reduction Plan, § Four (I)(A)(5). Nissan responds by stating that Mr. Shamblin's knowledge of facts relevant to this cause was obvious in light of references contained in various documents in this matter to him and his involvement in the repossession. The court takes this argument to mean that the defendant contends that Ms. Geeslin has not been prejudiced by Nissan's failure to make appropriate disclosures because Ms. Geeslin knew or should have known of Mr. Shamblin's involvement regardless of any failure to disclose.

The plaintiff has also moved to strike the affidavit of Kathleen Foster, which was attached by the defendant as an exhibit to its motion for summary judgment and response to the plaintiff's motion for partial summary judgment. Again, like in the case of Mr. Shamblin's affidavit, the plaintiff's contention in this regard is that Ms. Foster was not mentioned in any of the defendant's core discovery disclosures as having knowledge concerning this cause. Nissan

responds by arguing that the plaintiff has suffered no prejudice from the submission of Ms. Foster's affidavit and also submits the affidavit of Tim Gardner, who provides substantially the same evidence, and who the defendant did list in its core disclosures.

This court declines to strike the affidavits of Mr. Shamblin and Ms. Foster, and shall not today make evidentiary rulings which will affect the trial of this matter. Instead, the undersigned shall take up the admissibility of these matters at the trial of this case. Further, for purposes of addressing the remaining motions at bar the court shall treat the affidavits as if they were admissible evidence.

. Motion to Strike Affidavit of Olivia Geeslin

The defendant has also moved to strike an affidavit in this case, and requests that this court strike the affidavit of the plaintiff. As the basis of its motion, the defendant contends that matters presented in Ms. Geeslin's affidavit are contrary to her prior deposition testimony. This court is cognizant that "it is well settled that this court does not allow a party to defeat a motion for summary judgment using an affidavit that impeaches, without explanation, sworn testimony." S.W.S. Erectors, Inc. v. Infax, Inc., 72 F.3d 489, 495 (5th Cir.1996); Thurman v. Sears, Roebuck & Co., 952 F.2d 128, 137 n. 23 (5th Cir.), *cert. denied,* 506 U.S. 845, 113 S.Ct. 136, 121 L.Ed.2d 89 (1992); Albertson v. T.J. Stevenson & Co., 749 F.2d 223, 228 (5th Cir.1984). Nevertheless, this court declines to strike the plaintiff's affidavit and shall instead give it appropriate weight in the consideration of the plaintiff's claim for damages in this cause.

. Summary Judgment Standard

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The burden rests upon the party seeking summary judgment to show to the district court that an absence of evidence exists in the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986); see Jackson v. Widnall, 99 F.3d 710, 713 (5th Cir. 1996); Hirras v. Nat'l R.R. Passenger Corp., 95 F.3d 396, 399 (5th Cir. 1996). Once such a showing is presented by the moving party, the burden shifts to the non-moving party to demonstrate, by specific facts, that a genuine issue of material fact exists. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986); Texas Manufactured Housing Ass'n, Inc. v. City of Nederland, 101 F.3d 1095, 1099 (5th Cir. 1996); Brothers v. Klevenhagen, 28 F.3d 452, 455 (5th Cir. 1994). Substantive law will determine what is considered material. Anderson, 477 U.S. at 248; see Nichols v. Loral Vought Sys. Corp., 81 F.3d 38, 40 (5th Cir. 1996). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Anderson, 477 U.S. at 248; see City of Nederland, 101 F.3d at 1099; Gibson v. Rich, 44 F.3d 274, 277 (5th Cir. 1995). Further, "[w]here the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue of for trial." Anderson, 477 U.S. at 248; see City of Nederland, 101 F.3d at 1099. Finally, all facts are considered in favor of the non-moving party, including all reasonable inferences therefrom. See Anderson, 477 U.S. at 254; Banc One Capital Partners Corp. v. Kneipper, 67 F.3d 1187, 1198 (5th Cir. 1995); Taylor v. Gregg, 36 F.3d 453, 455 (5th Cir. 1994); Matagorda County v. Russell Law, 19 F.3d 215, 217 (5th Cir. 1994). However, this is so only when there is "an actual

controversy, that is, when both parties have submitted evidence of contradictory facts." Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994); Guillory v. Domtar Industries Inc., 95 F.3d 1320, 1326 (5th Cir. 1996); Richter v. Merchants Fast Motor Lines, Inc., 83 F.3d 96, 97 (5th Cir. 1996). In the absence of proof, the court does not "assume that the nonmoving party could or would prove the necessary facts." Little, 37 F.3d at 1075 (emphasis omitted); see Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888, 111 L. Ed. 695, 110 S. Ct. 3177 (1990).

. Plaintiff's claim that repossession resulted in a "breach of the peace"

. Independent Contractor Defense

Initially, the defendant contends that it cannot be liable on the plaintiff's claims of wrongful repossession because it employed an independent contractor, who in turn engaged another independent contractor, in order to effect the repossession. Generally, a party is not responsible under the doctrine of *respondeat superior* for injuries caused by the acts of an independent contractor in their employ. E.g., James W. Sessums Timber Co., Inc. v. McDaniel, 635 So. 2d 875 (Miss. 1994); W.J. Runyon & Son, Inc. v. Davis, 605 So. 2d 38, 44 (Miss. 1992); Mississippi Emp. Sec. Com'n v. PDN, Inc., 586 So.2d 838, 841 (Miss.1991). As the parties are well aware, however, the Mississippi Supreme Court has previously rejected the traditional "independent contractor" defense in a self-help repossession case.

> We . . . hold as a sound and salutary principle that when one employs another to perform a task in which a serious danger to person or property, a crime, or some tort can reasonably be anticipated in its performance, it is no defense to say the act causing the harm was committed by an independent contractor.

Hester v. Bandy, 627 So. 2d 833, 842 (Miss. 1993). The defendant concedes that the repossession of automobiles is a business "fraught with danger and ripe for misunderstanding, property damage and violence." Defendant's Brief, p. 5. Nevertheless, Nissan urges a different

result in this case based upon the fact that the contractor it hired, Loss Recovery, Inc., itself hired as an independent contractor - Hunter Recovery - to execute the repossession. See Clayton v. Edwards, 483 S.E. 2d 111 (Ga. Ct. App. 1997). The Clayton case is inapposite from the situation at bar and involves the application of Georgia statutory law instead of the principle of foreseeable harm espoused in Hester.

> Under Georgia law, an employer is generally not liable for the torts of an independent contractor. OCGA § 51-2-4. OCGA § 51-2-5(5), however, provides an exception to this general rule of nonliability where "the employer retains the right to direct or control the time and manner of executing the work or interferes and assumes control so as to create the relation of master and servant or so that an injury results which is traceable to his interference."

Clayton, 483 S.E. 2d at 113. In any event, the undersigned does not believe that Nissan can avoid the impact of Hester merely by adding another "layer" of independent contractors. If a single independent contractor is insufficient for a creditor to avoid liability for reasonably anticipated dangers or torts, it does not follow that an additional independent contractor makes those dangers or torts any less foreseeable. To permit Nissan to avoid liability in this manner would be to allow it to avoid that holding of Hester altogether, and could serve as the impetus for the brokering of repossession services in Mississippi as a method to circumvent liability. Contrary to Nissan's lamentations, this court's ruling does not leave Nissan "stripped of any control whatsoever in pursuing its objective to regain its property by peaceable, lawful means." Defendant's Brief, p. 5. Numerous business solutions exist to alleviate Nissan's dilemma. It may draft its contacts with recovery services to forbid subcontracting, require insurance or indemnification bonds of those it hires to recover automobiles to cover any acts of subcontractors, or adopt any number of commercial alternatives to protect its interests. The independent contractor status of Loss Recovery, Inc., or of Hunter Recovery is no solace to

Nissan against this claim of the plaintiff.

. Merits of the claim

Under the provisions of Mississippi's version of the Uniform Commercial Code, a lessor has the right to repossess leased goods upon default of the lease agreement by the lessee.

> (2) After a default by the lessee under the lease contract of the type described in Section 75-2A-523(1) or 75-2A-523(3)(a) or, if agreed, after other default by the lessee, the lessor has the right to take possession of the goods . . . . .
>
> (3) The lessor may proceed under subsection (2) without judicial process *if it can be done without breach of the peace* or the lessor may proceed by action.

Miss. Code Ann. § 75-2A-525 (2), (3) (emphasis added). When determining whether an action is committed "without breach of the peace," the court looks to judicial construction of that term. Mississippi caselaw has defined the term to mean that the repossession must be done without force or violence. Hester v. Bandy, 627 So. 2d 833, 840 (Miss. 1993); Commercial Credit Co. v. Spence, 185 Miss. 293, 297, 184 So. 439, 441 (1938). Likewise, the repossession constitutes a "breach of the peace" if it is done over the objection of the lessee. Hester, 627 So. 2d at 840 ("It is generally held that U.C.C. § 9-503 does not authorize the secured party to repossess the collateral by forcible removal or over the protest of the debtor owner."). With regard to the creditor's right to enter upon the lessor's property to retrieve the collateral, the Mississippi court stated:

> We hold that simply going upon the private driveway of the debtor and taking possession of secured collateral, without more, does not constitute a breach of the peace. . . . This, however, is the limit of the right to repossess without instituting legal action.

Hester, 627 So. 2d at 840; Branson v. Nissan Motor Acceptance Corp., 963 F. Supp. 595, 597 (S.D. Miss. 1996).

While there are few Mississippi cases on point, caselaw from other jurisdictions is fairly uniform on the extent to which a secured party may enter upon the debtors property. As stated in Hester, no breach of the peace occurs merely because the repossessor enters upon a person's driveway, carport, or into an open garage to retrieve the vehicle. Dearman v. Williams, 235 Miss. 360, 370, 109 So.2d 316, 320-21 (1959); Martin v. Cook, 237 Miss. 267, 276, 114 So.2d 669, 670 (1959); see also First and Farmers Bank of Somerset, Inc. v. Henderson, 763 S.W.2d 137, 138 (Ky. Ct. App. 1988); Pierce v. Leasing Intern., Inc., 235 S.E.2d 752 (Ga. Ct. App. 1977); C.I.T. Corp. v. Short, 115 S.W.2d 899, 900-901 (Kan. 1938). However, if the repossessor enters or opens a closed or locked garage, a breach of the peace has almost always occurred. See, e.g., Davenport v. Chrysler Credit Corp., 818 S.W.2d 23, 30 ("A breach of the peace is almost certain to be found if the repossession is accompanied by the unauthorized entry into a closed or locked garage.") (citing 2 J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 27-6, p. 577 n. 11 (3d Ed. 1988)); Headspeth v. Mercedes-Benz Corporation, --- A.2d ---, 1998 WL 142150, *3 (D.C. App.) ("A breach of the peace within the meaning of [§ 9-503] has been held to occur . . . where the secured creditor breaks into unopened buildings or garages."); Wallace v. Chrysler Credit Corp., 743 F. Supp. 1228, 1232 (W.D. Va. 1990). Further, the Mississippi Supreme Court, in Hester, cited with approval the Alabama Supreme Court decision of Madden v. Deere Credit Services, Inc., 598 So.2d 860 (Ala.1992), which stated that

> [self help repossession] does not justify the use of any force to enter, to remove the thing, or to prevent interference by the possessor. Since the conditional seller or other actor has parted freely and voluntarily with his original possession, he is not privileged to recover it by force, and must resort to his remedy at law. . . . The actor will therefore be liable if he breaks and enters the land, as by removing a padlock.

Madden, 598 So. 2d at 864 (quoting from adopting view from Restatement (Second) of Torts §

183 (1965)). The undersigned finds all of the above authorities persuasive, and believes them to be correct applications of the law of self help repossession. These cases are consistent with Hester and it is this court's Erie guess that the Mississippi Supreme Court would utilize these or similar holdings in the interpretation of Miss. Code Ann. § 75-2A-525.

The situation presently before the court presents a classic example of a genuine issue of material fact - when the defendant's agent repossessed the Altima, was the Geeslin's garage door open or closed? Competent evidence is before the court from which a reasonable trier of fact could determine the answer in favor of either side. This question precludes any award of summary judgment on the plaintiff's claim that the automobile was wrongfully repossessed. The plaintiff's motion for partial summary judgment on this issue shall be denied, and the defendant's motion for summary judgment on this issue shall also be denied.

. Plaintiff's Claim under the Fair Credit Reporting Act

Additionally, the plaintiff claims that the defendant is liable for violating the Fair Credit Reporting Act, 15 U.S.C. § 1681 ("FCRA"). Seeking to have the plaintiff's FCRA claims dismissed pursuant to its motion for summary judgment, the defendant states the applicable provisions of the FCRA were not effective against it at the time of the violations alleged in this case. More specifically, Nissan charges that it did not come under the terms of the FCRA for claims such as these until September 30, 1997. 15 U.S.C. § 1681(a), (d)(2). In response, the plaintiff does not contest this allegation, but rather contends that she may still maintain a claim against Nissan in light of Nissan's duty under the FCRA to update and correct information. 15 U.S.C. § 1681s-2(a)(2). This court agrees. While the plaintiff may have no claim against Nissan under the FCRA for actions that arose prior to September 30, 1997, she may be able to establish

a claim under 15 U.S.C. § 1681s-2(a)(2). As such, the defendant's motion shall be granted only to the extent that it pertains to claims of the plaintiff which arose prior to September 30, 1997. The remainder of the defendant's motion in this regard shall be denied.

3. Plaintiff's Claim for Emotional Distress Damages

Nissan moves this court to grant summary judgment on the issue of the plaintiff's claim for damages regarding emotional distress and mental pain and suffering.

> It is undisputed that the plaintiff suffered no physical or bodily injury from the repossession of her automobile. Plaintiff has not sought the treatment of any medical professional. . . . Where that is the case, there can be no recovery of mental pain or suffering under a negligence cause of action.

Defendant's Brief, p. 8. In support of its motion, Nissan directs this court to several past Mississippi decisions addressing the viability of damage claims for emotional distress or "mental anguish." See, e.g., Morrison v. Means, 680 2d 803, 806 (Miss. 1996); Strickland v. Rossi, 589 So. 2d 1268 (Miss. 1991); Sears Roebuck & Co. v. Devers, 405 So. 2d 898, 901 (Miss. 1981). More recently, however, the Mississippi Supreme Court noted

> [t]he rule once was that, to recover damages for emotional distress, the plaintiff had to prove either (a) an intentional or at least grossly negligent tort or (b) negligence accompanied by physical impact. The Court has relaxed this rule in a long series of cases, beginning with First National Bank v. Langley, 314 So.2d 324, 328 (Miss.1975), and including Sears, Roebuck & Co. v. Devers, 405 So.2d 898, 902 (Miss.1981); Entex, Inc. v. McGuire, 414 So.2d 437, 444 (Miss.1982); Royal Oil Co. v. Wells, 500 So.2d 439, 448 (Miss.1986); Blue Cross & Blue Shield of Mississippi, Inc. v. Maas, 516 So.2d 495, 498 (Miss.1987); Singleton v. Stegall, 580 So.2d 1242, 1247 (Miss.1991); and most recently Wirtz v. Switzer, 586 So.2d 775, 784 (Miss.1991); see also McLoughlin v. O'Brian, (1983) 1 A.C. 410. *The upshot of these cases in the present rule is a plaintiff may recover for emotional injury proximately resulting from negligent conduct, provided only that the injury was reasonably foreseeable by the defendant.*

Southwest Mississippi Regional Medical Center v. Lawrence, 684 So. 2d 157, 1268 (Miss. 1996) (emphasis added). The Lawrence court went on to affirm an award of mental distress damages

without the presentation of any proof of either medical treatment or physical trauma. Lawrence, 684 So. 2d at 1268. In sum, under the present pronouncements of the Mississippi Supreme Court, the plaintiff's damages must be evaluated by this court like any other claim of damages - by the examination of any type of sufficient evidence demonstrating that an injury occurred as a proximate cause of the defendant's conduct. The undersigned declines to delve into the evidence today, and shall instead review the matter at the trial of this cause. Therefore, as to the plaintiff's claim for damages regarding emotional distress or mental anguish, the defendant's motion shall be denied.

. Plaintiff's Claim for Conversion

The defendant also seeks summary judgment separately for the plaintiff's claims of conversion. To the extent that the defendant refers in its motion to the plaintiff's claim for conversion of the automobile, that claim is part and parcel with the plaintiff's claim that the automobile was wrongfully repossessed. It is the same claim, for

> [i]f the creditor breaches the peace, then "the repossession [will be deemed] wrongful, and the debtor may sue the [creditor] in conversion for return of the collateral or [actual and consequential] damages, plus punitive damages in the proper case."

Ivy v. General Motors Acceptance Corp., 612 So. 2d 1108, 1117 (Miss. 1992). As this court has already determined that genuine issues of material fact preclude an award of summary judgment on that claim of the plaintiff, there is no need to reiterate those reasons here. The plaintiff also charges Nissan with the conversion of personal property contained within the automobile at the time of repossession. While Nissan states conclusorily in its submissions to the court that it is entitled to summary judgment on these claims as well, it offers no support for the proposition. As to this portion of the defendant's motion for summary judgment, the motion shall be denied.

. Conclusion

Upon consideration of the motions at bar, the court finds that most of them are not well taken. The various motions to strike filed by the parties shall be denied. The plaintiff's motion for partial summary judgment shall also be denied. Finally, the defendant's motion for summary judgment shall be granted insofar as it pertains to the plaintiff's claims under the Fair Credit Reporting Act which arose after September 30, 1997. As to the remainder of the plaintiff's claims, the defendant's motion shall be denied. In any event, the parties are reminded that this court has the discretion, which it exercises here, to deny the various motions for summary judgment and permit the development of the plaintiff's claims before the trier of fact. See, e.g., Kunin v. Feofanov, 69 F.3d 59, 61 (5th Cir. 1995); Black v. J.I. Case Co., 22 F.3d 568, 572 (5th Cir. 1994); Veillon v. Exploration Services, Inc., 876 F.2d 1197, 1200 (5th Cir. 1989).

A separate order in accordance with this opinion shall issue this day.

This the _____ day of April 2001.

_____
United States District Judge

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ORDER DENYING MOTIONS TO STRIKE, DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Pursuant to the memorandum opinion issued this day, it is hereby ORDERED THAT:

) the plaintiff's motion to strike the affidavit of Mike Shamblin is hereby DENIED;

) the plaintiff's motion to strike the affidavit of Kathleen Foster is hereby DENIED;

) the defendant's motion to strike the affidavit of the plaintiff Olivia Geeslin is hereby DENIED;

) the plaintiff's motion for the entry of partial summary judgment on her behalf is hereby DENIED; and

) the defendant's motion for the entry of summary judgment on its behalf is hereby GRANTED IN PART and DENIED IN PART. The motion is hereby GRANTED insofar as it seeks dismissal of the plaintiff's claim that the defendant Nissan

violated the Fair Credit Reporting Act prior to September 30, 1997. Any such claims of the plaintiff are hereby DISMISSED. The remainder of the defendant's motion in this regard is hereby DENIED.

SO ORDERED, this the _____ day of June 1998.

United States District Judge